

SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement ("Agreement") is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS"), (collectively the "United States"); the State of Texas ("Texas"), and the Texas Health and Human Services Commission ("THHSC"); Defendants, Tomball Regional Hospital ("Tomball"), and Dr. Emanuel Paul Descant, II ("Descant"); and Relator, Toni Vrabel ("Relator"); (hereafter referred to as "the Parties"), through their authorized representatives.

II. PREAMBLE

As a preamble to this Agreement, the Parties agree to the following:

A. At all times relevant hereto, Tomball, was a full service, 357-bed facility located in Tomball, Texas which provided medical services for the residents of northwest Houston, Tomball, Waller, Cypress, and Magnolia, Texas.

B. At all times relevant hereto, Descant, was a family practice physician on the staff at Tomball and at one time, the Medical Director of the Texas Wound and Lymphedema Center located at Tomball.

C. Relator is an individual resident of Texas. On March 16, 2005, Relator filed a qui tam action in the United States District Court for the Southern District of Texas captioned *U.S., ex rel. Toni Vrabel v. Tomball Regional Hospital and Paul Descant, M.D.*, Civil Action No. 05-0959 (hereinafter referred to as "the Civil Action"). An amended complaint was filed on June 21, 2005 adding the State of Texas as a plaintiff.

D. Relator is a former employee of Tomball who initially worked as a hyperbaric technician and later became the Wound Care Coordinator of the Tomball Wound Care Center (hereafter referred to as “the Center”).

E. The United States contends that Tomball and Descant submitted or caused to be submitted claims for payment to the Medicare Program (Medicare), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395hhh and the Medicaid Program (Medicaid), 42 U.S.C. §§ 1396-1396v.

F. The United States contends that it has certain civil claims, as specified in Paragraph 2, below, against Tomball and Descant for engaging in the following conduct during the period from January 1, 2000 through December 31, 2005: knowingly presenting or causing to be presented false or fraudulent claims for payment or approval to the United States and the State of Texas by billing and receiving payments for hyperbaric oxygen therapy (hereafter referred to as “HBO”), in situations where the patients’ condition did not authorize payment by Medicare and Medicaid for the HBO and would not have been reimbursed had the patients’ true diagnosis been reported; billing and receiving payments for HBO therapy where documentation failed to support the diagnosis code billed; and/or billing for services not rendered (hereinafter referred to as the “Covered Conduct”). Any Medicaid crossover payments associated with the Covered Conduct were improperly paid and are encompassed in the Covered Conduct.

G. The United States also contends that it has certain administrative claims, as specified in Paragraphs 4 and 5 below, against Tomball and Descant for engaging in the Covered Conduct.

H. Texas contends that Tomball and Descant made false claims and false statements to Texas in connection with reimbursement claims that Tomball and Descant submitted to Texas under the Medicaid Program (Title XIX of the Social Security Act, 42 U.S. C. §§1396, *et seq.*) in violation of the Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code Ann. §§36.001, *et seq.*

I. This Agreement is neither an admission of liability by Tomball and Descant nor a concession by the United States that its claims are not well founded.

J. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties reach a full and final settlement pursuant to the Terms and Conditions below.

III. TERMS AND CONDITIONS

1. Tomball and Descant agree to pay to the United States \$816,081.48 as follows: \$796,422.69 for Medicare and \$19,658.79 for Texas Medicaid (hereafter referred to as the "Settlement Amount"), for which they are jointly and severally liable unto the United States. The United States agrees to pay \$122,412.22 of the Settlement Amount to Relator as a share (hereafter referred to as "Relator's Share"), pursuant to applicable federal and state law. Tomball and Descant further agree to pay Relator \$12,195.00 for expenses and attorney's fees and costs, for which they are jointly and severally liable. Tomball and Descant further agree to pay the Texas Office of Attorney General \$5,000.00 for expenses and or attorney's fees and costs, for which they are jointly and severally liable. The foregoing payments shall be made as follows:

a. Tomball and Descant agree to pay the full Settlement Amount to the United States by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the Southern District of Texas. Tomball and Descant agree to make this electronic funds transfer no later than the Effective Date of this Agreement.

b. Contingent upon the United States receiving the Settlement Amount from Tomball and Descant and as soon as feasible after receipt, the United States agrees to pay \$122,412.22 to Relator by electronic funds transfer.

c. Tomball and Descant agree to pay \$12,195.00 for expenses and attorney's fees and costs to Relator by electronic funds transfer, pursuant to instructions to be provided by Relator's counsel.

d. Tomball and Descant agree to pay \$5,000.00 for expenses and or attorney's fees and costs to the Texas Office of Attorney General by electronic funds transfer, pursuant to instructions to be provided by Abel Rosas, Manager of Financial Reporting in the Texas Office of Attorney General Accounting Division.

2. Subject to the exceptions in Paragraph 6, below, in consideration of the obligations of Tomball and Descant in this Agreement, conditioned upon Tomball and Descant's full payment of the Settlement Amount, the United States (on behalf of itself, its officers, agents, agencies, and departments) agrees to release Tomball and Descant, together with their current and former parent corporations, each of its direct and indirect subsidiaries, brother or sister corporations, divisions, current or former owners, officers, directors, and affiliates, and the successors and assigns of any of them, from any civil or administrative monetary claim the United States has or may have

for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud.

3. Subject to the exceptions in Paragraph 6, below, in consideration of the obligations of Tomball and Descant in this Agreement, conditioned upon Tomball and Descant's full payment of the Settlement Amount, Relator, for herself and for her heirs, successors, attorneys, agents, and assigns, agrees to release Tomball and Descant, together with their current and former parent corporations, each of its direct and indirect subsidiaries, brother or sister corporations, divisions, current or former owners, officers, directors, and affiliates, and the successors and assigns of any of them, from any civil monetary claim the United States has or may have for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

4. In consideration of the obligations of Tomball in this Agreement, and the Corporate Integrity Agreement ("CIA"), entered into between OIG-HHS and Tomball, conditioned upon Tomball's full payment of the Settlement Amount, OIG-HHS agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from Medicare, Medicaid, and other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against Tomball under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities) for the Covered Conduct, except as reserved in Paragraph 6, below, and as reserved in this Paragraph. OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Tomball from Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory

exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 6, below.

5. OIG-HHS expressly reserves all rights to institute, direct, or to maintain any administrative action seeking exclusion against Descant from Medicare, Medicaid, or other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) or 42 U.S.C. § 1320a-7(b) (permissive exclusion).

6. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including Tomball, Descant, and Relator) are the following claims of the United States and Texas:

a. Any civil, criminal, or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability;

c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs;

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any liability based upon such obligations as are created by this Agreement;

f. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;

g. Any liability for failure to deliver goods or services due;

h. Any liability of individuals, including current or former directors, officers, employees, agents, or shareholders of Defendants, except to the extent expressly released under Paragraph 2 above.

7. Relator and her heirs, successors, attorneys, agents, and assigns agree not to object to this Agreement and agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B) and, conditioned upon receipt of Relator's share, Relator, for herself individually, and for her heirs, successors, agents, and assigns, fully and finally releases, waives, and forever discharges the United States, its officers, agents, and employees, from any claims arising from or relating to 31 U.S.C. § 3730; from any claims arising from the filing of the Civil Action; and from any other claims for a share of the Settlement Amount; and in full settlement of any claims Relator may have under this Agreement. This Agreement does not resolve or in any manner affect any claims the United States has or may have against Relator arising under Title 26, U.S. Code (Internal Revenue Code), or any claims arising under this Agreement.

8. Conditioned upon receipt of the payment described in Paragraph 1.b, Relator, for herself and for her heirs, successors, attorneys, agents, and assigns, agrees to release Tomball and Descant, their officers, agents, and employees, from any liability to Relator arising from the filing of the Civil Action, or under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs.

9. Tomball and Descant waive and shall not assert any defenses Tomball and/or Descant may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

10. Tomball and Descant fully and finally release the United States and Texas, their agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Tomball and Descant have asserted, could have asserted, or may assert in the future against the United States or Texas, their agencies, employees, servants, and agents, related to the Covered Conduct and the United States' or Texas' investigation and prosecution thereof.

11. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare carrier or intermediary or any state payer, related to the Covered Conduct; and Tomball and Descant shall not resubmit to any Medicare carrier or intermediary or any state payer any previously denied claims related to the Covered Conduct, and shall not appeal any such denials of claims.

12. Tomball and Descant agree to the following:

a. Unallowable Costs Defined: That all costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47; and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395hhh and 1396-1396v; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Tomball and/or Descant, their present or former officers, directors, employees, shareholders, and agents in connection with the following shall be “unallowable costs” on government contracts and under the Medicare Program and Medicaid Program:

(1) The matters covered by this Agreement;

(2) The United States and Texas’ audit(s) and civil investigation(s) of the matters covered by this Agreement;

(3) Tomball and Descant’s investigation, defense, and corrective actions undertaken in response to the United States’ audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorney’s fees);

(4) The negotiation and performance of this Agreement;

(5) The payment Tomball and Descant make to the United States pursuant to this Agreement and any payments that Tomball and Descant may make to Relator, including costs and attorneys fees; and

(6) The negotiation of, and obligations undertaken pursuant to the CIA:

(I) Retain an independent review organization to perform annual reviews as described in Section III of the CIA; and

(ii) Prepare and submit reports to OIG-HHS.

However, nothing in this Paragraph 12.a.(6) that may apply to the obligations undertaken pursuant to the CIA affects the status of costs that are not allowable based on any other authority applicable to Tomball and Descant. (All costs described or set forth in this Paragraph 12.a. are hereafter “unallowable costs.”)

b. Future Treatment of Unallowable Costs: These unallowable costs shall be separately determined and accounted for in nonreimbursable cost centers by Tomball and also by Descant in his individual capacity, and Tomball and/or Descant shall not charge such unallowable costs directly or indirectly to any contracts with the United States or any State Medicaid program, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by Tomball and/or Descant or any of their subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or Federal Employees Health Benefits (hereafter referred to as “FEHBP”), Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Tomball and Descant further agree that within 90 days of the Effective Date of this Agreement they shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements,

information reports, or payment requests already submitted by Tomball and/or Descant or any of their subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. Tomball and Descant agree that the United States, at a minimum, shall be entitled to recoup from Tomball and/or Descant any overpayment plus applicable interest and penalties as a result of the inclusion of such unallowable costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by Tomball and/or Descant or any of their subsidiaries or affiliates on the effect of inclusion of unallowable costs (as defined in this Paragraph) on Tomball and/or Descant or any of their subsidiaries or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine Tomball and/or Descant's books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph.

13. Subject to the exceptions in Paragraph 6 above, in consideration of the obligations of Tomball and/or Descant in this Agreement, conditioned upon their full payment of the Settlement Amount, Texas (on behalf of itself, its officers, agents, agencies, and departments) agrees to release Tomball and Descant from any civil or administrative monetary claim Texas has or may

have for the Covered Conduct under the Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code Ann. §§36.001, *et seq.* or the common law theories of payment by mistake, unjust enrichment, and fraud.

14. In consideration of the obligations of Tomball in this Agreement and conditioned upon Tomball's full payment of the Settlement Amount, the THHSC agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking the exclusion of Tomball from Medicaid, under Chapter 32 of the Texas Human Resources Code and under 1 Texas Administrative Code (TAC) §§ 371.1653, 371.1655, or 371.1657 for the Covered Conduct, except as reserved in Paragraph 6, above, and as reserved in this Paragraph. The THHSC expressly reserves all rights to comply with any statutory obligations to exclude Tomball from Medicaid, under Chapter 32 and/or Chapter 36 of the Texas Human Resources Code, Chapter 531 of the Texas Government Code, 1 TAC §§ 371.1653, and 371.1655 (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the THHSC from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 6 above.

15. The THHSC expressly reserves all rights to institute, direct, or to maintain any administrative action seeking exclusion against Descant from Medicaid, under Chapter 32 of the Texas Human Resources Code and under 1 TAC §§ 371.1653, 371.1655, or 371.1657 for the Covered Conduct. The THHSC expressly reserves all rights to comply with any statutory obligations to exclude Descant from the Medicaid program under 42 U.S.C. § 1320a-7(a), 1 TAC §§ 371.1653, and 371.1655 (mandatory exclusion) based upon the Covered Conduct.

16. This Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Paragraph 17, below.

17. Tomball and Descant waive and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

18. Tomball and Descant warrant that they have reviewed their financial situation and that they currently are solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the United States of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, they: (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Tomball and Descant, within the meaning of 11 U.S.C. § 547(c)(1); and (b) conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity that Tomball and/or Descant were or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

19. Except as expressly provided to the contrary in this Agreement, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

20. Tomball and Descant represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

21. Relator represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

22. This Agreement is governed by the laws of the United States and the State of Texas. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement is the United States District Court for the Southern District of Texas, except that disputes arising under the CIA shall be resolved exclusively under the dispute resolution provisions in the CIA.

23. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

24. Upon receipt of the payments described in Paragraph 1.a.-c. above, Relator shall promptly sign and file in the Civil Action a Stipulation of Dismissal with prejudice of the Civil Action pursuant to the terms of this Agreement.

25. The individuals signing this Agreement on behalf of Tomball and Descant represent and warrant that they are authorized by Tomball and Descant to execute this Agreement. The individual(s) signing this Agreement on behalf of Relator represent and warrant that they are authorized by Relator to execute this Agreement. The United States and Texas signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

26. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

27. This Agreement is binding on Tomball's and Descant's successors, transferees, heirs, and assigns.

28. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

29. All Parties consent to the United States' and Texas' disclosure of this Agreement, and information about this Agreement, to the public.

30. This Agreement is effective on the date of signature of the last signatory to this Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 08/13/17

BY: Jill O. Venezia
DONALD J. DeGABRIELE, JR.
United States Attorney
JILL O. VENEZIA
Assistant United States Attorney
United States Attorney's Office
Southern District of Texas

DATED: 7/23/07

BY: Lewis Morris
LEWIS MORRIS
Chief Counsel to the Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human
Services

THE STATE OF TEXAS

DATED: _____

BY: 

GREG ABBOTT

Attorney General of Texas

KENT C. SULLIVAN

First Assistant Attorney General

JEFF L. ROSE

Deputy First Assistant Attorney General

MARK TOBEY

Chief, Antitrust & Civil Medicaid Fraud Division

PATRICK J. O'CONNELL

Assistant Attorney General

Chief, Civil Medicaid Fraud Section

KERRY MULDOWNEY ASCHER

Assistant Attorney General

Attorneys for the State of Texas

DATED: _____

BY: _____

BRIAN FLOOD

Inspector General

Office of Inspector General

Texas Health & Human Services Commission

DATED: 7-31-07

BY: 


ALBERT HAWKINS

Executive Commissioner

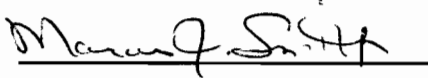
Texas Health and Human Services Commission

TOMBALL REGIONAL HOSPITAL - DEFENDANT


DATED: 06/12/07

BY: 
L. LYNN LeBOUEF
President/CEO of Tomball Regional Hospital

DATED: 7/17/07

BY: 
MARCUS J. SMITH
Chairman of the Board of Directors of
Tomball Hospital Authority

DATED: 07/16/07

BY: 
MARY M. BEARDEN
Attorney for Tomball Regional Hospital

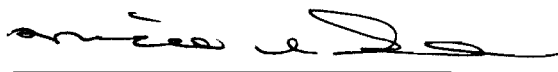
EMANUEL PAUL DESCANT, II, M.D. - DEFENDANT

DATED: _____

BY: _____

EMANUEL PAUL DESCANT, II, M.D.
Defendant


DATED: 11/17/02

BY:  _____

MICHAEL L. DURHAM
Attorney for Defendant Descant


TONI VRABEL - RELATOR

DATED: _____

BY:  _____
TONI VRABEL

Relator

DATED: _____

BY:  _____
R. MARK PAYNE
Attorney for Toni Vrabel

EMANUEL PAUL DESCANT, II, M.D. - DEFENDANT

DATED: 7/16/07

BY: 
EMANUEL PAUL DESCANT, II, M.D.
Defendant

DATED: _____

BY: _____
MICHAEL L. DURHAM
Attorney for Defendant Descant

TONI VRABEL - RELATOR

DATED: _____

BY: _____
TONI VRABEL
Relator

DATED: _____

BY: _____
R. MARK PAYNE
Attorney for Toni Vrabel